

STEVE MCKUNE)	
Claimant)	
VS.)	
)	
RUSSELL COUNTY)	
Respondent)	
AND)	
)	
KANSAS WORKERS RISK COOP)	
Insurance Carrier)	

Docket No. 259,575

The issues before the Board on this appeal are:

1. For purposes of the Workers Compensation Act, was claimant an employee or an independent contractor when he was injured while working for respondent?
2. Should claimant be permitted to raise the issue of equitable estoppel for the first time on this appeal?

FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. Claimant began working for respondent, Russell County, as a welder in either 1996 or 1997. Claimant described his work as primarily welding bridges and road equipment. But claimant also welded cells at the county jail and welded at the county fairgrounds. Claimant did other work for respondent which did not require welding, but that work was extremely limited.
2. Respondent paid claimant \$13 per hour and computed claimant's hours from daily employee time sheets. Respondent did not withhold taxes from claimant's checks and at the end of the year reported the payments to claimant on a Form 1099. Claimant understood that he was responsible for his own taxes.
3. After claimant began working for respondent, the individual who hired claimant advised him that he was covered under respondent's workers compensation insurance. Claimant testified that the topic of workers compensation insurance coverage was brought up several times.
4. The parties stipulated that for preliminary hearing purposes claimant's average weekly wage was \$300. That weekly rate indicates that claimant worked an average of approximately 23 hours per week.
5. Claimant reported to work each morning and respondent would assign him the specific jobs or tasks to be performed that day. Respondent controlled which job or task that claimant would perform and in what order. On days that claimant did not want to work, he would ask for the day off. Claimant testified, as follows:

Q. (By Mr. Mize) You ever discuss with them when a welding job is completed, if there's going to be anything to do the next day?

A. (By claimant) There's more work than could ever be done. There's always work. Some days they don't have help to be able to help a welder, or they've got other things going on elsewhere that they just -- it's not feasible for it to happen that day.

Q. And some days if you don't want to show up for work, you just, you don't have to; right?

A. I'll call in and let Bob know I'm not going to be there, or I'll be there and just ask for the day off. I try never to leave nobody hanging.¹

6. After claimant began working for respondent, the county offered claimant a full-time position when respondent's previous welder left. Claimant testified that he declined the position as he did not want to submit to respondent's control. When asked why he declined the welder's position, claimant explained:

The biggest reason is I don't want to work full time for them is because they have too much control over your life.

I mean, they've got so many rules and standards and things to do that I just don't feel as though I want to be permanently involved with that.²

. . .

. . . I didn't want them to control what I do after work.

I don't have a company policy book that has all the rules and regulations in it, but listening to the other hands that work out there, I don't want nothing to do with it.³

7. Claimant does not operate an independent business. But claimant does perform some odd jobs in his garage for personal friends. The record is not clear whether or not claimant is paid for that work.

8. Respondent provides all the materials and equipment that claimant uses. On occasion, respondent also provides claimant with an assistant at the county's cost.

CONCLUSIONS OF LAW

1. For the reasons below, the Board reverses the preliminary hearing finding that claimant was an independent contractor rather than an employee for purposes of the Workers Compensation Act.

¹ Preliminary Hearing, November 8, 2000; pp. 30, 31.

² Preliminary Hearing, November 8, 2000; p. 29.

³ Preliminary Hearing, November 8, 2000; p. 31.

2. The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.⁴

3. Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so.⁵

4. It is often difficult to determine in a given case whether a person is an employee or independent contractor because there are elements pertaining to both relations that may occur without being determinative of the relationship.⁶

5. There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁷

6. The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁸

7. The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.⁹

8. In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6)

⁴ K.S.A. 44-501(g).

⁵ Kinder v. Murray & Sons Constr. Co., 264 Kan. 484, 957 P.2d 488 (1998).

⁶ Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

⁷ Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984).

⁸ Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

⁹ Wallis, at 102-103.

the length of time that the worker is employed; (7) whether the worker is paid by time or by job; and (8) whether the work is part of the regular business of the employer.¹⁰

9. Based upon the following facts, the Board concludes that, for purposes of the Workers Compensation Act, claimant should be considered an employee:

- (1) The parties did not contract to perform a certain project or an assigned task for a negotiated price;
- (2) Claimant did not operate an independent business;
- (3) Respondent provided claimant with assistants at respondent's cost;
- (4) Respondent provided all the materials and tools that claimant used while working for respondent;
- (5) Respondent assigned claimant to perform specific tasks and controlled the order in which claimant would perform them;
- (6) By the time of the accident, claimant had worked for respondent for three or four years; therefore, claimant and respondent had a long-standing and ongoing relationship;
- (7) Respondent paid claimant by the hour rather than by the job or project;
- (8) The work that claimant performed was a regular part of respondent's duties and responsibilities to the public;
- (9) Claimant performed the same duties for respondent that a former full-time employee had performed;
- (10) Claimant reported for work every morning and would ask for the day off, if he did not want to work; and
- (11) Respondent had advised claimant after hiring him that he was covered under respondent's workers compensation insurance coverage.

10. The Board concludes that claimant should be considered a part-time employee for purposes of the Workers Compensation Act. Based upon that conclusion, the question of

¹⁰ McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994).

whether claimant should be permitted to raise the issue of equitable estoppel for the first time on appeal is rendered moot.

11. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹¹

WHEREFORE, the Board reverses the preliminary hearing finding and concludes that claimant was an employee of the respondent at the time of the alleged June 26, 2000 accident.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

c: Mitchell D. Wulfekoetter, Topeka, KS
John W. Mize, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

¹¹ K.S.A. 44-534a(a)(2).